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No. 323

In the
Supreme Court of the United States

OCTOBER TERM, 1940

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,
Petitioner,

versus

CITY OF SANFORD, FLORIDA, AND THE UNITED STATES OF AMERICA,
(Intervenor).

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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CITY OF SANFORD, FLORIDA, et al.,

Respondents.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

Preliminary Statement

A.

Inasmuch as the counsel for the Government has misconceived the points relied upon by the appellant in this appeal and has premised its argument on questions not in issue and not relied upon in these proceedings, in all fairness to it and to the petitioner this reply to its brief is submitted.

The Facts

B.

The statement of facts set forth by the Government is substantially correct except that it is not conceded, as alleged on page 3 of the Government's brief,

that the city on February 1, 1937, adopted a *plan for the composition* and adjustment of its indebtedness by the issuance of refunding bonds in exchange for outstanding bonds of the city. As a matter of fact, no *plan of composition* could have been adopted then because the Bankruptcy Act was not in existence at that time. The plan referred to was nothing more than voluntary offer made by the city to any of its creditors who chose to accept the same.

Argument

I.

The Government grounds its contention upon the theory that debts theretofore irrevocably cancelled might be revived for the purpose of creating an identity of interest in the coercing bondholders so that the coercing bondholders might be affected by the plan to the same extent that the non-consenting bondholders were affected, and that being true, that the amendment, **83** (j), is not in conflict with other portions of the act and the Constitution of the United States. It reasons:

1. That those coercing bondholders whose debts must of necessity be revived, if they are to be included as consenting creditors, were at one time (prior to the passage of the act), though not now, in the same position as the petitioner, and it reasons further that the voluntary acceptance of the refunding bonds by them is a warranty of the fairness of the plan now before the court.

2. (a) It reasons further that it is constitutional because there was no vested right in the petitioner to insist upon the continuation of the bond settlement, and

(b) That the petitioner has not shown that the State of Florida might not authorize the rescision of the bond settlement agreement.

3. That had the Bankruptcy Act been in existence at the time the voluntary exchanges were made, there would have been no question but that the majority could have validly bound petitioner under composition agreement.

Thus, they reason that 83 (j) might retroactively validate consents theretofore existing by reason of the acceptance of refunding bonds and revive debts no longer in existence solely for the purpose of showing an identity of interest.*

II.

The argument of the Government under the first numbered paragraph of its brief has overlooked the actual state of facts in this case when it says

> "that at the time the present holders of the refunding bonds consented to the plan and exchanged the old securities for the new, they were in precisely the same position as the petitioner."

It does not appear that the present consentors to the refunding plan are the same holders who exchanged the bonds under the voluntary agreement. The record shows that the consenting creditors accepted their se-

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* The Government does not concede that the Congress can not constitutionally legislate on the subject of bankruptcy without making provision for the majority consent in this class of cases, see *U. S. vs. Bekins*, 304 U. S. 27, 47, and the petitioner does not dispute the fact that Congress might constitutionally legislate without making provisions for majority consents, but if it does, the holders of all indebtedness existing either at the time of the passage of such legislation or at the time of the adjudication in bankruptcy must be treated alike, and for this purpose may not revive indebtedness prohibited by state law.

curities long prior to the enactment of the Bankruptcy Act and the amendment Subsection 83 (j), and therefore could not have accepted them in contemplation of any bankruptcy proceedings. Thus, the holders of refunding bonds are definitely not in the same position as the petitioner herein.

The petitioner's position is that it is arbitrary legislation to permit the holders of voluntarily scaled down indebtedness, who are not to be affected by the adjudication, to coerce and force the holders of indebtedness which has not been scaled down to accept a plan of composition based not upon the ability of the city to pay as of the date of the adjudication, but based upon the ability of the city to pay at some arbitrarily fixed date in the past (see pages 9 to 15 of Petition for Writ of Certiorari).

Further, it is impossible under the statutes and laws of the State of Florida for these holders of refunding bonds to be placed back again in the same position as the petitioner (see foot note page 6 of Petition for Writ of Certiorari).

We point out, also, that at the time of the exchange of bonds, the matter was not presented to the court:

(a) for any adjudication as to its fairness,

(b) as to whether or not all of the provisions of the Bankruptcy Act had been complied with,

(c) whether or not the fees taken by the bondholders' committee were fair and equitable,

(d) whether or not there was any preference accorded to any of the acceptors of refunding bonds,

(e) or any of the other requirements that the debtor must comply with before the matter is finally confirmed by an adjudication of bankruptcy.

There was no finding that the plan was fair and equitable, and the fact that refunding bonds had been accepted was no warranty of the fairness of the plan as applied to all bondholders, contrary to the Government's contention in the first numbered portion of its brief.*

III.

In the second numbered portion of its brief, the Government has misconceived the position of the petitioner. Petitioner does not claim that it was a party to nor an intended beneficiary of the bond settlement. It insists that it is not a party to the voluntary adjustment and that its rights are not dependent upon being a party to such adjustment, but are rights, which, incident to the ownership of the bonds not included in a voluntary adjustment, are protected under the Fifth Amendment.

(a) Petitioner does not question the fact that, had the settlement been made conditional upon the acceptance of the plan by all the creditors, the coercing cred-

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* Precisely the same question was raised recently in the case of *Case v. Los Angeles Lumber Co.*, 84 Lawyers Ed. 22, where it was submitted under 77B that where the required percentage of creditors had accepted a plan, that was evidence that it was fair and equitable. This court definitely rejected such a contention, saying:

> "It is clear from a reading of 77B(f) that Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable.' The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All of those interested in the estate are entitled to the court's protection. Accordingly, the fact that the vast majority of the security holders have approved the plan, is not the test of whether the plan is a fair and equitable one."

itors would have an identity of interest with the non-assenting creditors. However, such was not the case, and the holders of refunding bonds have irrevocably scaled their debt and there is no way in which their former claim can be revived for any purpose whatsoever.

The city is not only not authorized by the State of Florida to rescind the bond settlement, but the statutes of the State of Florida expressly forbid any increase in indebtedness in the manner suggested by the government. (See footnote Page 6 and Page 12 of Petition for Writ.) Indeed, Section 83 (e) of the act itself provides that it must appear that the taxing unit "is authorized by law to take all action necessary to be taken by it to carry out the plan." (11 U.S.C.A. Sec. 403 (e) (6).) This phrase "authorized by law" was said by this court in *U. S. vs. Bekins,* 304 U. S. 27. 49, 52 to "manifestly refer to the law of the state" and the Act itself was said to have been "carefully drawn so as not to impinge upon the sovereignty of the state. The State retains control of its fiscal affairs."

The construction given by the government to the amendment Sec. 83 (j), if upheld by this Court, would impinge violently upon the sovereignty of the State; a result which was carefully avoided by the authors of the act itself.

Counsel for the Government have overlooked the fact that we are not here dealing with a binding executory settlement agreement which might be rescinded by agreement of the parties, but are dealing with an absolute cancellation of indebtedness and issuance of entirely new evidences of indebtedness.

Petitioner makes no claimed advantage under the Fifth Amendment by virtue of the voluntary bond settlement, but it does claim, in view of the prohibition of that amendment, that to permit those whose debts are not to be affected by an adjudication to bring other creditors into court and force them to scale down their indebtedness is a denial of due process of law.

The cases cited by the Government to justify its position, viz., *Edward Hines Trustees vs. U. S.*, 263 U. S. 143; *Sprunt & Sons. vs. U. S.*, 281 U. S. 249, are not in any sense applicable to the situation. In those cases, the court ruled that a shipper who had previously enjoyed a competitive advantage by reason of carrier's freight rates could not be heard to complain of a change in rates by the carrier under an order of the Interstate Commerce Commission, which change did away with undue prejudice and preference as between shippers. There the complainers were not threatened with any legal wrong. In the instant case petitioner has an independent legal right, viz., a right not to be coerced into accepting a plan of composition except by the consents of those creditors similarly situated (i.e. to be affected by the adjudication) and the right to have the ability of the city to pay determined on the basis of its outstanding debt as of the date of the filing of the petition and not as of a date fixed at some arbitrary prior time.

(b) The Government, in part 2 of Subsection (b) of its brief, again demonstrates the fundamental errors of its position. It has overlooked the fact that the first Municipal Bankruptcy Act was stricken down by this court (*Ashton vs. Cameron County Dist.*, 298 U. S. 513) because invading the province of state's rights,

and also has overlooked that this court, in *U. S. vs. Bekins,* 304 U. S. 27, 47, upheld the second Municipal Bankruptcy Act as not being violative of state's rights because the taxing unit was authorized by the law of the State to take advantage of the act of Congress. The Government, in this portion of its brief, does not attempt to show that the bond settlement can be rescinded by the law of the State of Florida, and it admits that the settlement was not rescinded by the parties and that the State of Florida has not authorized the rescinding of the bond settlement agreement, which authorization under the ruling of this court would be necessary for the City of Sanford to take advantage of the Amendment 83 (j) of the Municipal Bankruptcy Act.

The Government's reference that the Fifth Amendment does not prohibit the state from authorizing the majority of bondholders to rescind the agreement is again begging the question. The Fifth Amendment has never been considered or held a prohibition upon the State but upon the Federal Government. Not only has the State of Florida never authorized the rescision of the agreement and the revival of debt, but it is prohibited from authorizing such revival of debt under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Certainly it is not due process of law if a statute, either State or Federal, baldly permitted some 4,000 holders of bonds of the principal sum of $1,000.00 each, by their votes to compel 240 non-assenting bondholders of bonds in the face value of $1,500.00 each, to accept a plan of composition which gave each of the 4,240 bondholders identical bonds of $1,000.00 each. This court would undoubtedly brand that statute as unconstitutional. Stripped of

those camouflaging details, that is exactly what the plan before the court contemplates doing. Petitioner's position is that this may not be done, either

(1) because 83 (j) does not authorize it, or

(2) because, if 83 (j) does authorize it, 83 (j) is unconstitutional.

IV.

In part 3 of its brief, the Government has posed a situation, not borne out by the record. This petitioner is not claiming any vested rights arising by reason of the bond settlement. It claims rights — contractual rights — given it under its bonds which, as has been shown, the State cannot change, nor can the Federal Government change in the manner proposed in the brief of the Government.

There were no consents given by the majority at the time the refunding agreements were executed. The alleged refunding agreement was only an exchange of bonds and a cancellation of indebtedness. The alleged *plan of composition* (R 2 to 4 and 23 to 47) was simply a resolution of the city authorizing refunding bonds, and a surrender and cancellation of old bonds in exchange therefor.

There were no consents given, so they could not be made retroactively. Section 83 (j) can not change a cancellation of debt and acceptance of new evidences of indebtedness into a contingent consent and revive a debt irrevocably cancelled.

Conclusion

In conclusion, petitioner respectfully submits that the Government has not shown any reason why this

court should not grant the petition and take jurisdiction, but on the contrary, has argued the merits of the controversy and the petitioner has accepted the challenge of the Government and answered it briefly on the merits in this, its Reply Brief.

The petitioner respectfully submits that it has heretofore shown in its Petition for Writ (Pages 15 to 20) the necessity for the issuance of a Writ of Certiorari.

Respectfully submitted,

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